

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Appeal No. 01-3300

Richard S. Bond,

Appellant,

vs.

Twin City Carpenters,

Appellee.

APPELLANT’S REPLY BRIEF

**BASSFORD, LOCKHART,
TRUEDELL & BRIGGS, P.A.**

Alan I. Silver (License 101023)
Kevin P. Hickey (License 202484)
3550 Multifoods Tower
33 South Sixth Street
Minneapolis, MN 55402
(612) 333-3000

*Attorneys for Appellant
Richard S. Bond*

**McGRANN SHEA FRANZEN
CARNIVAL STRAUGHN
& LAMB, CHARTERED**

David Anderson (License 1818)
Pamela Hodges Nissen (License 259810)
U.S. Bancorp Center
800 Nicollet Mall, Suite 2600
Minneapolis, MN 55402-7035
612-338-2525

*Attorneys for Appellee
Twin City Carpenters*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. THE PLAN CREATES A PRESUMPTION OF COST-SPLITTING WHICH THE RECORD IN THIS CASE SHOWS HAD THE IMPACT ON BOND OF INHIBITING THE INITIATION OR PROCESSING OF PLAN CLAIMS	2
II. THE DEPARTMENT OF LABOR HAS TAKEN A CONSISTENT POSITION OPPOSING MANDATORY ARBITRATION PROVISIONS WHICH IMPOSE FEE-SPLITTING ARRANGEMENTS	7
III. THE FUND SHOULD REIMBURSE BOND FOR THE FEES DUE TO THE ARBITRATOR	11
CONCLUSION	14

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<i>Cole v. Burns International Security Services</i> , 105 F.3d 1465 (D.C. Cir. 1997)	6
<i>Graphic Comm. Union No. 2 v. GCIU-EMP Point Retirement Benefit Plan</i> , 917 F.2d 1184, 1188 (9th Cir. 1990)	5
<i>Great-West Life & Annuity Ins. Co. v. Knudson</i> , ___ U.S. ___, 122 S. Ct. 708 (2002)	12, 13
<i>Green Tree Financial Corp. v. Larketta Randolph</i> , 531 U.S. 79, 90 (2000)	6
<i>Laprade v. Kidder, Peabody & Co.</i> , 246 F.3d,702, 705-08 (D.C. Cir. 2001)	5
<i>Lawrence v. Westerhaus</i> , 749 F.2d 494, (8th Cir. 1984)	6
<i>Mertens v. Hewitt Associates</i> , 508 U.S. 248, 256 (1993)	12
<i>Paladino v. Avnet Computer Technologies, Inc.</i> , 134 F.3d 1054 (11th Cir. 1998)	6
<i>Shankle v. B-G Maintenance Management of Colorado, Inc.</i> , 163 F.3d 1230, 1235 (10th Cir. 1999)	6
<i>Southern Council of Industrial Workers v. Ford</i> , 83 F.3d 966, 969 (8th Cir. 1996)	2

FEDERAL STATUTES

29 U.S.C. § 1132(a)(3)	11
29 U.S.C. § 1132(g)(1)	5

ERISA Section 502(a)(3)	11
-------------------------------	----

ERISA Section 502(g)(1)	5
-------------------------------	---

FEDERAL REGULATIONS

65 F.R. 70265	8
---------------------	---

65F.R. 70252	9
--------------------	---

65F.R. 70253	9-11
--------------------	------

OTHER AUTHORITIES

29 C.F.R. 2560.502-1(b)	7
-------------------------------	---

29 C.F.R. § 2560.503-1(a)	8, 9
---------------------------------	------

29 C.F.R. § 2560.503-1(b)(1)(iii)	2
---	---

INTRODUCTION

In Appellee's brief and Addendum, Appellee Twin City Carpenters and Joiners Pension Fund (the "Fund") ignores the record in this case, ignores the inhibiting impact of its mandatory arbitration provision as shown in the Affidavit of Appellant Bond, and ignores the repeated statements of the Department of Labor in successive regulations and advisory opinions which clearly indicate that a fee-splitting clause like that in the Plan violates ERISA's claims procedures.

This Reply Brief will focus on three issues raised in Appellee's Brief. First, Bond will address the impact of the presumption created by the Fund's cost-splitting provision. Second, we will address the impact of the recently enacted ERISA claims regulations, and address the Fund's clear misinterpretation of those regulations. Finally, we will address Bond's right to reimbursement for the arbitrator's fee, and the impact of his agreement for a reduction of the fee which the Fund mysteriously labels a "secret agreement."

ARGUMENT

I. THE PLAN CREATES A PRESUMPTION OF COST-SPLITTING WHICH THE RECORD IN THIS CASE SHOWS HAD THE IMPACT ON BOND OF INHIBITING THE INITIATION OR PROCESSING OF PLAN CLAIMS.

The Fund acknowledges in its brief that both the federal regulations, 29 C.F.R. § 2560.503-1(b)(1)(iii) and the DOL Opinion Letter interpreting that regulation, Opinion Letter No. 82-46A (1982) (Add. 1) invalidate any mandatory arbitration clause which requires splitting of the arbitrator's fee. The Fund, however, suggests that its clause is different because it merely creates a presumption of that arbitration fees will be split. The Fund's brief states that DOL Opinion Letter No. 82-46A supports its position that "a provision which permits, perhaps even presumes, but does not mandate the apportionment of costs between a benefit plan and a participant, does not violate the rule of reasonableness." Appellee's Brief, page 14. Thus, the Fund's position turns on the difference between a mandate and a presumption. It is not a meaningful distinction when applied to a regulation which is designed to prevent any chilling effect on participants' right to obtain review of plan claims determinations. The record in this case illustrates this impact.

The Fund's brief completely ignores Richard Bond's Affidavit, which is reproduced at page 103 of the Joint Appendix (App. 103). Upon receiving the

decision of the Fund's Claims Appeal Committee of the Board of Trustees dated January 6, 1998, Bond was faced with a difficult choice. The Committee had ruled against his interpretation of the Fund's suspension of benefit rules, and under Section 6.5 of the Trust document (App. 26), Bond did not have a right to bring a Court proceeding. He was living primarily on the pension he received from the Fund of approximately \$1,000 per month, supplemented by carpentry jobs, App. 103, and he was concerned that under the fee-splitting provision of the Trust document, he might be required to share in the costs of the arbitration. App. 104. Because of his limited income, he was concerned that demanding arbitration cost him more than he could afford. He believed that he could have been able to qualify for free or low-cost legal help if he had been able to bring a claim in Court. *Id.* In a sense, Bond was lucky. He was able to obtain help from the Minnesota Senior Federation, and was able to negotiate a reduction of the potential fee from the arbitrator. *Id.*

When Bond's circumstances are analyzed in the context of the DOL regulations which state that a claims procedure is reasonable only if it is "not administered in a way which unduly inhibits or hampers the initiation or processing of plan claims," the distinction between a mandatory cost-splitting provision and a presumption of cost-splitting simply makes no sense. The purpose of the regulation is to allow plan participants and beneficiaries to assert their right to review of claims decisions. When

analyzed from the point of view of such a participant, the inhibition is just as great where there is a presumption of liability for significant arbitration fees as it would be the case if there was a mandatory fee-splitting provision. A presumption and a mandate are not much different as seen through the eyes of a low-income participant faced with the decision as to whether to pursue an adverse plan determination or simply accept the decision without appeal.

An arbitration clause takes away what would otherwise be a statutory right of appeal, and the very premise of the DOL regulation is that this right should be taken away only if there is a reasonable claims alternative which does not “unduly inhibit” or “unduly hamper” the right of appeal. The fact that Bond had to seek outside assistance to negotiate a special arrangement with the arbitrator shows that the distinction between a mandatory arbitration clause and a presumption is not a meaningful distinction. Participants who are not as old as Bond, not eligible to be served by the Minnesota Senior Federation, or who do not have as much initiative as Bond displayed in this case, would be left without the ability to assert valid claims review rights.

The illusory distinction between a mandatory and presumptive fee-splitting provision is also illustrated by the arbitrator’s written decision in this case. The decision dated October 27, 1998 describes in detail why the arbitrator felt that the

Fund's suspension of benefit rules should be upheld. In contrast, the arbitrator's statement that "the fees and costs of this arbitration shall be equally borne by the parties" is contained in a single line, without explanation or analysis. App. 50. It appears that the arbitrator didn't give much thought to whether the arbitration fees should be apportioned to one party or the other, and that he simply applied the presumption of fee-splitting without analysis. One of the difficulties with a clause like the Fund's arbitration provision is that an arbitrator who is not experienced in ERISA litigation might tend to view the arbitration provision in the context of the American rule for apportionment of attorney's fees, in which each side pays its own attorney, rather than in the context of the ERISA attorneys' fees statute, ERISA Section 502(g)(1), 29 U.S.C. § 1132(g)(1), where a participant may not even pay his own attorney's fees in a Court proceeding.

The plan cites the only case which has upheld a presumptive cost-splitting arbitration provision, *Graphic Comm. Union No. 2 v. GCIU-EMP Point Retirement Benefit Plan*, 917 F.2d 1184, 1188 (9th Cir. 1990), but as Bond pointed out in his initial Brief, that Court's comparison of an arbitration fee to a small court filing fee is a very questionable comparison. See Appellant's Brief, page 21; *see also*, *Laprade v. Kidder, Peabody & Co.*, 246 F.3d, 702, 705-08 (D.C. Cir. 2001) (distinguishing between filing fees and similar costs which could be assessed and compensation to

the arbitrator, which could not). That is particularly true with respect to a low-income individual who may be able to avoid court filing fees through *in forma pauperis* procedures, and whose ability to pay would clearly be taken into account by a Court in an ERISA case in deciding whether to award attorneys' fees. One of the factors which courts in this circuit must consider in deciding whether to award fees is the ability of the person against whom the fees are to be assessed to pay the award. *Lawrence v. Westerhaus*, 749 F.2d 494, (8th Cir. 1984).

The cases under Title VII which invalidate fee-shifting provisions such as *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230, 1235 (10th Cir. 1999) and *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998), are applicable to the ERISA claims regulations because of those courts' expressed concerns about the very issue that the ERISA regulations address – the unduly inhibiting impact of an arbitration fee-splitting provision on assertion of statutory rights. These cases invalidate provisions which do not mandate fee-sharing. In fact, in *Paladino*, the arbitration agreement was silent on the subject of fees, and the Court was concerned that this silence raised the possibility that the plaintiff's statutory rights would be inhibited by the mere possibility of fee-splitting. See Discussion at Appellant's Brief, pages 19 and 20. See also *Green Tree Financial*

Corp. v. Larketta Randolph, 531 U.S. 79, 90 (2000), where the Supreme Court discussed its concern about arbitration costs precluding vindication of federal statutory rights.

II. THE DEPARTMENT OF LABOR HAS TAKEN A CONSISTENT POSITION OPPOSING MANDATORY ARBITRATION PROVISIONS WHICH IMPOSE FEE-SPLITTING ARRANGEMENTS.

The Department of Labor has consistently interpreted its own regulations which prohibit any claims procedure which “unduly inhibits or hampers” the initiation or processing of plan claims as prohibiting arbitration clauses which cause a participant to pay a portion of arbitration costs. In Bond’s Initial Brief, we suggested that the new federal claims regulation, 29 C.F.R. 2560.502-1(b) simply clarifies existing law when it states that “a provision or practice that requires payment of the fee or costs as a condition to making a claim or to appealing an adverse benefit determination would be considered to unduly inhibit the initiation and processing of claims for benefits” The District Court rejected this argument, stating that “the Court cannot accept plaintiff’s claim that the amended regulation merely clarifies existing law.” Add. 6; App. 111. The Fund, however, disagrees with the District Court, and states in heading C on page 15 of its brief that the new regulations “merely reaffirm prior law.” The Fund’s brief states that the prior law is that plans are valid that have provisions calling for discretionary apportionment of arbitration costs; however, as stated above, the

distinction between mandatory and presumptive fee-splitting provisions is not a meaningful distinction.

The Fund again misapplies the DOL commentary accompanying the new regulation in order to give the misleading impression that the language forbidding fee-splitting provisions applies only to welfare benefit plans. Tracking through the statutory provisions clearly shows, however, that the Fund is misinterpreting the regulation.

Paragraph (a) of the new regulation, § 2560.503-1(a), found at 65 F.R. 70265, and at page 11 of Appellant's Addendum (Add. 11), is the scope provision for the new regulation. It states that "except as otherwise specifically provided in this section, these requirements apply to every employee benefit plan" The next paragraph of § 2560.503-1 is paragraph (b) which contains the provisions governing the obligation to establish and maintain reasonable claims procedures. Paragraph (b) starts by stating that "Every employee benefit plan shall establish and maintain reasonable claims procedures. . . ." (emphasis added). Paragraph (b)(3) contains the prohibition on any claims procedure which "unduly inhibits or hampers the initiation or processing of claims for benefits.". Paragraph (b)(3) then states the following:

For example, a provision or practice that requires payment of a fee or costs as a condition to making a claim or to appealing an adverse benefit

determination would be considered to unduly inhibit the initiation and processing of claims for benefits. (Add. 11.)

Thus, the prohibition on arbitration provisions which require payment of fees or costs is contained in paragraph (b), which applies to every employee benefit plan. The next paragraph of the regulation, paragraph (c), applies only to group health plans. (Add. 12.)

The commentary contained at 65F.R. 70253 which the district court cited in its opinion, and which the Fund relies upon here, must be read with the distinction in mind between paragraphs (b) and (c) of § 2560.503-1. The commentary at 65F.R. 70252 begins by talking about comments received in response to the DOL's earlier proposal to ban arbitration completely. The DOL states that it rejected this proposal:

With respect to the proposal's ban on arbitration, a significant number of commenters representing unions, multi-employer plans, and employers objected that this reform was contrary to the general approach of the federal government, as expressed in the Federal Arbitration Act, to encourage the appropriate use of alternative dispute resolution.

65F.R. 70252, cited at p. 9 of Appellee's Addendum.

The comment goes on to state in the next paragraph that the Department decided not to ban arbitration completely, but rather to restrict mandatory arbitration in paragraph (c) of the regulation which applies only to welfare benefit plans:

After careful deliberation on the issues raised by the commenters regarding the use of alternative dispute resolution for benefit claims

disputes, the Department has revised its approach to permit plans, pursuant to subparagraph (c)(4), to require some limited forms of mandatory arbitration.

65 F.R. 70253, Appellee's Add. 9.

The Department then contrasts the above statement which applies only to group health plans, with subparagraph (b)(3) which applies to all employee benefit plans:

By retaining the complete prohibition on imposing costs on claimants in connection with filing or appealing a claim, however, subparagraph (b)(3) makes clear that any process used by a plan to resolve a claim dispute, including arbitration, must be conducted without imposing fees on the claimant. (Emphasis added).

Id. Finally, the last sentence of the paragraph refers back to the restrictions in subparagraph (c)(3) and states “these restrictions apply, under the regulation, only to group health plans and plans providing disability benefits.” *Id.*

The way the Department drafted the comment is admittedly confusing, but the Districts Court's reading of the comment completely ignores the distinction between paragraph (b) which applies to all employee benefit plans and paragraph (c) which is limited to group health plans.

Bond and the Fund have both pointed out that the new claims regulation only applies to claims arising on or after January 1, 2002. Nevertheless, the new regulations are significant because they state that “the regulation . . . contains standards respecting benefit claims procedures for pension and other welfare plans that are substantially

similar to those currently in effect under the regulation promulgated by the Department in 1977.” Appellee’s Add. 7. Thus, the commentary on its face states that the only thing that has changed is procedures impacting group health plans and plans providing disability benefits. Thus, when the comment states that “subparagraph (b)(3) makes clear that any process used by a plan to resolve a claim dispute, including arbitration, must be conducted without imposing fees on the claimant,” 65 F.R. 70253, Appellee’s Add. 7, the regulation is merely restating pre-January 1, 2002 law. An arbitration provision which imposes fees on the claimant is prohibited not only by the new regulation, but by the regulations which have existed since 1977, and which apply to Bond. The Fund’s fee-splitting arbitration provision is invalid.

III. THE FUND SHOULD REIMBURSE BOND FOR THE FEES DUE TO THE ARBITRATOR.

The Fund argues in its brief that Bond may not seek monetary damages under ERISA. The Fund, however, misconstrues Bond’s claim. Under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), a participant may not only seek to enjoin a practice that violates the provisions of ERISA, he or she may obtain “appropriate equitable relief . . . to redress such violations or . . . enforce . . . the terms of the plan.” “Appropriate equitable relief” as used in § 502(a)(3) means “those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not

compensatory damages).” *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993). In *Southern Council of Industrial Workers v. Ford*, 83 F.3d 966, 969 (8th Cir. 1996), the Eighth Circuit held that an action lies under § 502(a)(3) for specific performance of a participant’s obligation to reimbursement from a plan under a subrogation clause.

The Supreme Court’s recent decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, ___ U.S. ___, 122 S. Ct. 708 (2002) does not mandate a different result. In *Great-West*, the Supreme Court held that an insurance company which had paid medical expenses pursuant to a stop-loss insurance agreement was not entitled to enforce its ERISA plan’s reimbursement provision because the relief sought was for legal damages, not equitable relief. The Court held that a claim which sought only legal relief - - the imposition of personal liability for a contractual obligation to pay money - - was not equitable relief. In contrast, Bond is not claiming a contractual obligation to pay money damages against the Plan. Rather, he is seeking to invalidate an illegal plan provision, and he is seeking to be returned to the position he would have been in if the unlawful provision had not been in effect. *Great-West* reaffirmed that ERISA § 502(a)(3) allows recovery for those categories of relief that were typically available in equity, including restitution. Invalidation of an illegal clause in a plan and restitution of sums improperly paid pursuant to the illegal provision is a classic form of equitable relief.

While claiming that Bond's claim is not equitable, the Fund nonetheless argues that Bond is not entitled to relief based on the equitable defense of "unclean hands." This equitable defense is based on the so-called "secret agreement" with the arbitrator. *See* Appellee's Brief, pp. 24-25. The reference to Bond's agreement with the arbitrator for a reduction of his portion of the arbitration fee as a "secret agreement" is apparently an effort to imply that this was an improper or inequitable agreement. The record does not indicate that the agreement was announced to the Fund, but the record also does not support the inference that Bond or the arbitrator tried to keep it "secret" from anyone. App. 103-104.

The agreement was nothing more than Bond's effort to avoid the in-terrorem impact of the Fund's onerous arbitration clause. He proceeded with the arbitration based on his understanding that the arbitrator would charge him no more than a few hundred dollars for the arbitrator's fee. *Id.* He did not challenge the fee splitting provision during the arbitration proceeding because as a lay person being represented only by a non-attorney advocate from the Minnesota Senior Federation, he did not know that DOL regulations prohibited such a provision, App. 104-105. It is perplexing why the Fund would question Bond's motives in negotiating a reduction in the fee so that he could assert his statutory right to review of the Plan's adverse claims determination. There was nothing inequitable or improper about Bond seeking

to reduce the impact of the Fund's arbitration clause, and certainly nothing which should prevent his right to equitable relief under ERISA § 502(a)(3).

CONCLUSION

For the foregoing reasons, and for the reasons stated in his Initial Brief, Appellant Richard Bond respectfully requests that the Court reverse the decision and order of the Court below granting summary judgment to the Fund, direct the entry of judgment in favor of Bond, and remand to the District Court for a determination of attorney's fees in favor of Bond.

**BASSFORD, LOCKHART, TRUESDELL
& BRIGGS, P.A.**

Dated:_____

By_____

Alan I. Silver (License #101023)
Kevin P. Hickey (License #202484)
Attorneys for Appellant Richard Bond
3550 Multifoods Tower
33 South Sixth Street
Minneapolis, Minnesota 55402
(612) 333-3000